

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of the )  
Pay Telephone Reclassification and )  
Compensation Provisions of the )  
Telecommunications Act of 1996 )

CC Docket No. 96-128 /

## PETITION FOR RECONSIDERATION

ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom ("ITC^DeltaCom"), by its attorneys, pursuant to 47 U.S.C. § 405 and 47 C.F.R. § 1.429, respectfully petitions the Federal Communications Commission ("FCC" or "the Commission") for reconsideration of certain aspects of its *Fourth Order on Reconsideration and Order on Remand* in the above-captioned docket.<sup>1</sup> Specifically, ITC^DeltaCom seeks reconsideration of the Commission's decision, *inter alia*, to impose retroactively on all interexchange carriers ("IXCs") the duty to pay per-payphone compensation for the first year of the interim period (*i.e.*, November 7, 1996 through October 6, 1997).

As explained below, ITC^DeltaCom respectfully submits that the Commission's action constitutes impermissible retroactive rulemaking. Further, apart from the issue of retroactive rulemaking, it would be inequitable and otherwise contrary to the public interest for the Commission to now impose a per-phone compensation obligation on small IXCs for the interim period. The Commission previously determined that small IXCs would have no duty to pay per-

<sup>1</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Fourth Order on Reconsideration and Order on Remand, CC Docket No. 96-128, FCC 02-22 (released January 31, 2002) ("Fourth Order on Reconsideration")*.

phone compensation during the first year of the interim period. Relying on that determination, ITC^DeltaCom did not maintain the records necessary to verify the compensation for which it would bear responsibility under the *Fourth Order on Reconsideration*. Also in reliance on the Commission's previous ruling, ITC^DeltaCom did not set aside funds for such payments, nor did it seek to recover the amounts necessary to pay per-payphone compensation from its customers. In these circumstances, it would be grossly unreasonable to retroactively impose a payphone compensation duty dating back to 1996 at this late date.

## **I. INTRODUCTION**

ITC^DeltaCom is a full-service telecommunications provider serving business customers throughout the southeastern United States. ITC^DeltaCom offers a bundled package consisting of facilities-based long distance, local, data and Internet network services, as well as customer premises equipment. Additionally, ITC^DeltaCom offers wholesale carrier services. ITC^DeltaCom, Inc., headquartered in West Point, Georgia, operates 35 branch locations in nine states, and its 10-state, approximately 9,980-mile fiber optic network reaches more than 160 points of presence.

## **II. THE COMMISSION LACKS AUTHORITY TO PRESCRIBE COMPENSATION RETROACTIVELY**

Under Commission precedent, reconsideration is appropriate where the petitioner either shows a material error or omission in the original order or raises additional facts not known or existing until after the petitioner's last opportunity to present such matters.<sup>2</sup> ITC^DeltaCom submits that in adopting the rule requiring IXCs to contribute to the per-payphone compensation plan for the first year of the interim period, the Commission committed a material error because

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<sup>2</sup> See, e.g., *American Distance Education Consortium Petition for Reconsideration*, 15 FCC Rcd 15448 (¶ 7) citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorrain*

it is using retroactive decision-making to cure an apparent gap created by judicial vacatur of an agency rule.

In 1996, the Commission adopted new rules governing the payphone industry to implement Section 276 of the Telecommunications Act of 1996.<sup>3</sup> Among the rules adopted was an interim payphone compensation plan that required IXC's with annual toll revenues in excess of \$100 million to compensate pay phone service providers ("PSPs") on a flat-rate per-phone compensation basis in proportion to that carrier's share of the annual toll revenues during the first year after the effective date of the new rules (*i.e.*, November 7, 1996 through October 6, 1997, also known as the first year of the interim period).<sup>4</sup> In the *Illinois* decision, the U.S. Court of Appeals for the D.C. Circuit vacated certain parts of the payphone compensation plan, including the requirement that only those IXC's with annual toll revenues over \$100 million pay compensation during the first year of the interim period.<sup>5</sup> In the *Fourth Order on Reconsideration*, the Commission adopted a new rule that retroactively requires all IXC's, as well as LEC's to the extent that LEC's receive compensable payphone calls, to now pay (nearly six

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*Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1996); see also 47 C.F.R. 1.106.

<sup>3</sup> Section 276 of the Telecommunications Act of 1996 required the Commission to promulgate regulations to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone." See *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56.

<sup>4</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, 20578 (¶ 72), 20601 (¶ 119) (1996) ("*First Report and Order*"); Order on Reconsideration, 11 FCC Rcd 21233 (1996) ("*First Reconsideration Order*"). The IXC's who had a duty to pay interim compensation were specifically identified in Appendix F of the *First Report and Order*.

<sup>5</sup> *Illinois Public Telecomm. Ass'n v. FCC*, 117 F.3d 555, 564-65, *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997).

years after the vacated rules were adopted) per-payphone compensation for the first year of the interim period.<sup>6</sup>

ITC^DeltaCom submits that the Commission's latest efforts to redetermine aspects of the compensation to be paid by IXC's and LEC's during the first year of the interim period pursuant to the *Illinois* decision are misguided and unlawful. In adopting the new rule that requires all IXC's to pay compensation during the interim period, the Commission apparently believed that such action was "required" on remand pursuant to court mandate.<sup>7</sup> Admittedly, the court did take issue with the Commission's allocation methodology, finding that the Commission acted arbitrarily and capriciously in requiring interim compensation payments only from large IXC's.<sup>8</sup> However, the court did not direct the Commission to adopt a rule that specifically required all IXC's to pay per-phone compensation during the first year of the interim period, nor could it.<sup>9</sup> Given that the compensation rules were vacated,<sup>10</sup> under governing Supreme Court precedent barring retroactive rulemaking absent Congressional assent, the court could not have issued such

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<sup>6</sup> *Fourth Order on Reconsideration* at ¶ 17.

<sup>7</sup> See e.g., *Fourth Order on Reconsideration* at n.18 ("the Commission . . . is engaging in implementing court mandates in the *Illinois* remand"); ¶ 15 ("Accordingly, the court requires that the Commission base any interim compensation duty on payment for the payphone calls received by that particular carrier, and no particular carrier must be required to pay for payphone calls received by other carriers."); ¶ 39 ("The court in *Illinois* rejected this allocation methodology and required that the compensation obligation be based on payment for the services received by that particular carrier"). (*emphasis added*).

<sup>8</sup> *Illinois*, 177 F.3d at 565.

<sup>9</sup> Strangely, even though the Commission indicates that the court required the Commission to impose the interim compensation payment obligation on all carriers, the Commission decided to omit resellers from this obligation. See *Fourth Order on Reconsideration* at ¶ 18.

<sup>10</sup> On motion for rehearing the court clarified that it had in fact vacated the part of the rule subjecting certain carriers to the interim period per-payphone compensation obligation. *Illinois Public Telecommunications Ass'n v. FCC*, 123 F.3d 693

mandate, nor is such act otherwise permissible.<sup>11</sup> No matter how displeased the court may have been with the Commission's reasoning, it did not direct the Commission to promulgate a rule which required all carriers to pay per-phone compensation during the interim period.

The Commission simply cannot adopt a rule now to impose compensation for the period during which it failed to adopt valid rules. An agency does not have authority to promulgate retroactive rules, unless Congress grants such authority in express terms.<sup>12</sup> Because neither Section 276 nor any other provision of the Communications Act authorizes the Commission to promulgate retroactive rules, the Commission lacks authority to establish a new compensation plan to cover the first year of the interim period.

The facts of *Bowen* are on point. In *Bowen*, the Secretary of Health and Human Services ("Secretary") promulgated a rule in 1981 imposing cost-limits on Medicare providers. *Bowen* at 206, 109 S.Ct. at 470. The rule was set aside in 1983 by the Court of Appeals for the D.C. Circuit, on the ground that the Secretary failed to provide notice and comment before issuing the rule as required under the APA. *Id.* The Secretary responded to this ruling by promulgating a new rule in 1984 (with proper notice) purporting to reissue the old cost-limit rule, retroactive to the original 1981 effective date. *Id.* at 207, 109 S.Ct. at 471. As the Supreme Court explained, the "net result was as if the original rule had never been set aside." *Id.* The Court held the new rule invalid, because no provision of the Medicare Act authorized the Secretary to promulgate retroactive rules. *Id.* at 209, 109 S.Ct. at 472. The Court emphasized that the power to adopt

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<sup>11</sup> See, e.g., *Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n*, 920 F.2d 50, 53 (D.C. Cir 1990) ("absent constitutional constraints or extremely compelling circumstances courts are never free to impose on [administrative agencies] a procedural requirement not provided for by Congress," citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543, 98 S.Ct. 1197, 1211 (1978) (internal quotation omitted).

retroactive rules must be conveyed “in express terms.” *Id.* “Even where some substantial justification for retroactive rulemaking is presented,” the Court held, “courts should be reluctant to find such authority absent an express statutory grant.” *Id.* Even where, as in *Bowen*, the agency’s intent was to “correct” a previous error, it does not have authority to promulgate retroactive rules. *See id.* at 225, 109 S.Ct. at 480 (Scalia, J. concurring) (“curative” retroactivity “ ‘would make a mockery . . . of the APA’ . . . since ‘agencies would be free to violate the rulemaking requirements of the APA with impunity if, upon invalidation of a rule, they were free to ‘reissue’ that rule on a retroactive basis’”).<sup>13</sup>

There can be no doubt that imposition of an interim compensation obligation upon all IXC’s would be retroactive rulemaking. The Commission’s initial order excluded small IXC’s from the obligation to pay interim compensation.<sup>14</sup> Relying upon the Commission’s determination that no compensation was owed, small IXC’s focused on preparing for per-call compensation, which was scheduled to begin in October 1997. By now imposing a duty on all IXC’s to pay compensation for the interim period, the rule would reach back and require

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<sup>12</sup> *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988); *see also Motion Picture Ass’n of America v. Oman*, 969 F.2d 1154, 1156 (D.C. Cir. 1992).

<sup>13</sup> By contrast, an agency may give retroactive effect to a new rule adopted in the course of an adjudication so long as the resulting inequities are counterbalanced by sufficiently significant statutory interests. *Bowen* at 220, 109 S.Ct. at 477 (Scalia, J. concurring) (referring to the Attorney General’s Manual on the Administrative Procedure Act for guidance). For example, in *United Gas Improvement Co. v. Callery Products, Inc.*, 382 U.S. 223, 86 S.Ct. 360 (1965), the Court held that the Federal Power Commission could permissibly order refunds in response to a judicial decision overturning a rate order. Unlike *Bowen*, and the instant matter, which involve a rulemaking proceeding, *Callery* dealt with an agency adjudication.

<sup>14</sup> ITC^DeltaCom notes that the Commission previously concluded, in light of the *Illinois* decision, that it could not “address the court’s concern that the Commission acted arbitrarily by only requiring payments from the largest IXC’s, because the Commission does not maintain adequate data for those carriers with annual toll revenues under \$100 million.” *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 13 FCC Rcd 10893, 10913 (¶ 33) (1998).

something that the small IXC's had no reason to expect.<sup>15</sup> The Commission cannot now tell carriers like ITC^DeltaCom that they owe compensation for the first year of the interim period without violating the prohibition on retroactive rulemaking.

The legal significance of a court order vacating a rule is to rescind the effect of that rule.<sup>16</sup> Under governing precedent, when the Commission replaces an existing rule with a new rule, and a court vacates all or part of the new rule, the effect is to reinstate the rules previously in force.<sup>17</sup> Because the Commission is legally barred from adopting a substitute rule for the interim period, the rule that was in effect before the invalid rule was adopted must spring into effect.<sup>18</sup> Prior to the payphone compensation proceedings, IXC's with annual toll revenues in excess of \$100 million were required to compensate competitive payphone owners flat-rate compensation in the amount of \$6 per phone per month.<sup>19</sup> Small IXC's, such as ITC^DeltaCom, were not required to pay per-phone compensation. Accordingly, because of the prohibition against retroactive rulemaking, the prior flat-rate obligation that was in effect before the court

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<sup>15</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505 (1994). In *Landgraf*, the Court said that impermissible retroactivity occurred where a statute "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Here, the Commission's new rule would have a retroactive effect because it would impose a per-phone payment obligation on small IXC's with respect to transactions already completed.

<sup>16</sup> See e.g., *Computer III Remand Proceedings*, Report and Order, 5 FCC Rcd 7719, 7719 (¶ 6) (1990) (finding that vacation of a rule returns the industry and Commission to the regime existing before the rule was rescinded); *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (holding that when an agency replaces an existing rule with a new rule, and a court vacates all or part of the new rule, the effect is to reinstate the rules previously in force).

<sup>17</sup> See, e.g., *Action on Smoking and Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983); *Computer III Remand Proceedings*, 5 FCC Rcd 7719, 7719 n.18 (1990).

<sup>18</sup> Compare *ICORE, Inc. v. FCC*, 985 F.2d 1075, 1080-81 (D.C. Cir. 1993), where a rule was remanded to the Commission for want of adequate reasoning, but not vacated. In contrast to *Bowen*, the court in *ICORE* found it inappropriate to set the rule aside and concluded that the Commission's application of a rule during remand was not forbidden retroactive rulemaking.

vacated the new rule is the only lawful per-phone compensation obligation that can be imposed for the first year of the interim period.

### **III. IMPOSING A DUTY TO PAY ON SMALL IXCS IS UNREASONABLE AND WILL BE UNDULY BURDENSOME AND UNFAIR FOR ITC^DELTACOM**

In reliance on the FCC's earlier decision, ITC^DeltaCom did not maintain the necessary call records, switch records, or billing records dating back to 1996. As a result, it is impossible for ITC^DeltaCom to verify what traffic it carried as an IXC from a payphone number during that time period.<sup>20</sup> In the *Fourth Order on Reconsideration*, the Commission stated that:

“the court requires that the Commission base any interim compensation duty on payment for the payphone calls received by that particular carrier, and no particular carrier must be required to pay for the payphone calls received by other carriers.”<sup>21</sup>

Therefore, the records which ITC^DeltaCom did not retain play a critical role in implementing the new payphone compensation regime.

ITC^DeltaCom has examined the data produced by BellSouth at the direction of the FCC. Without any call or switch records to compare with those payphone records, ITC^DeltaCom cannot determine what is properly compensable. To impose a duty to pay interim compensation on carriers that have been deprived of the ability to verify and confirm which calls were “received by that particular carrier” is arbitrary and wholly inconsistent with the Commission's stated rationale. Moreover, this is not a situation where the Commission can simply assume that the payphone billing data will always be accurate. Based on its experience as both a long distance carrier and a local exchange carrier, ITC^DeltaCom can attest from first-hand experience that the bills rendered to its by other telecommunications carriers and providers are

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<sup>19</sup> *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Second Report and Order, 7 FCC Rcd 3251, 3255 (¶ 30) (1992).

<sup>20</sup> See Declaration of Sara Plunkett, Vice President of Finance, ITC^DeltaCom (attached).



frequently erroneous, often severely so. The ability to verify and confirm any payments based on internal records is critical to ensuring that a carrier does not pay more compensation than it is legally responsible for.

In addition, ITC^DeltaCom did not set aside the funds necessary to pay the six-year-old invoices that will be created by the *Fourth Order on Reconsideration*. ITC^DeltaCom did not seek to recover those amounts from its customers in 1996, nor is it even remotely feasible for ITC^DeltaCom to recover such funds from its current customer base. It is a useful analogue to compare the obligation that this decision would impose on small IXC's with the Commission's current policies regarding back-billing. It would clearly be an unreasonable practice in violation of Section 201 of the Communications Act for a carrier to back-bill a customer for charges incurred approximately six years ago.<sup>22</sup> It is just as unreasonable for the Commission to engage in the regulatory equivalent of back-billing, particularly when small IXC's, like ITC^DeltaCom, would be precluded by the Commission's policies from back-billing its own customers to recover the necessary funds.

In sum, the Commission's decision to impose retroactively on all IXC's the duty to pay per-payphone compensation for the first year of the interim period, if allowed to stand, will unreasonably and unfairly prejudice small IXC's, such as ITC^DeltaCom.

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<sup>21</sup> See *Fourth Order on Reconsideration* at ¶ 15. (emphasis added).

<sup>22</sup> E.g., *Brooten v. AT&T*, 12 FCC Rcd 13343 (1997); *The People's Network v. AT&T*, 12 FCC Rcd 21091 (1997).

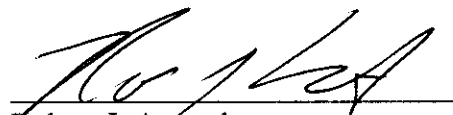
#### IV. CONCLUSION

For the foregoing reasons, ITC^DeltaCom respectfully requests the Commission to reconsider the aspects of its *Fourth Order on Reconsideration* discussed above.

Respectfully submitted,

ITC^DELTACom COMMUNICATIONS, INC.

By:



Robert J. Aamo  
Steven A. Augustino  
Randall W. Sifers  
Kelley Drye & Warren LLP  
1200 19th Street, N.W.  
Suite 500  
Washington, DC 20036  
(202) 955-9600

Its Attorneys

Dated: April 3, 2002

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CC Docket No. 96-128

**DECLARATION OF SARA PLUNKETT**

I, Sara Plunkett, pursuant to section 1.16 of the Commission's Rules, 47 C.F.R. § 1.61, do hereby declare the following:

1. This declaration is made on behalf of ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom, ("ITC^DeltaCom") in support of its *Petition for Reconsideration* attached hereto.

2. I am Vice President of Finance of ITC^DeltaCom.

3. I have read the attached *Petition for Reconsideration* and declare that the facts regarding ITC^DeltaCom's business operations are true and correct to the best of my knowledge and belief.

4. In particular, I declare that ITC^DeltaCom does not maintain call detail records, switch records, or billing records related to pay telephone messages dating back to 1996.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 3rd day of April, 2002.



Sara Plunkett

## **CERTIFICATE OF SERVICE**

I, Beatriz Viera-Zaloom, hereby certify that on this 3rd day of April, 2002, copies of the attached Petition for Reconsideration filed on behalf of ITC^DeltaCom Communications, Inc. in CC Docket No. 96-128 were served by hand or by first-class mail on the following:

Dorothy Attwood, Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Tamara Preiss, Chief  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Lynne Milne  
Pricing Policy Division  
Wireline Competition Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

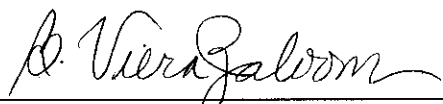
Kyle Dixon  
Legal Advisor to Chairman  
Michael K. Powell  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Matthew Brill  
Legal Advisor to Commissioner  
Kathleen Q. Abernathy  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Daniel Gonzalez  
Senior Legal Advisor to Commissioner  
Kevin J. Martin  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Jordan Goldstein  
Senior Legal Advisor to Commissioner  
Michael J. Copps  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Qualex International  
445 12th Street, S.W.  
Room CY-A257  
Washington, D.C. 20554

  
Beatriz Viera-Zaloom